

## (Caption of Case)

In Re: Friends of the Earth and Sierra Club,  
Complainants/ Petitioners,

v.

South Carolina Electric & Gas Co.,  
Defendant / Respondent.BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

## COVER SHEET

DOCKET

NUMBER: 2017 - 207 - E

(Please type or print)

Submitted by: Robert GuildSC Bar Number: 2358Address: 314 Pall Mall StreetTelephone: (803) 917 573Columbia, SC 29201

Fax: \_\_\_\_\_

Other: \_\_\_\_\_

Email: bguild@mindspring.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

## DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously☐ Other: \_\_\_\_\_

## INDUSTRY (Check one)

## NATURE OF ACTION (Check all that apply)

- ☒ Electric  
☐ Electric/Gas  
☐ Electric/Telecommunications  
☐ Electric/Water  
☐ Electric/Water/Telecom.  
☐ Electric/Water/Sewer  
☐ Gas  
☐ Railroad  
☐ Sewer  
☐ Telecommunications  
☐ Transportation  
☐ Water  
☐ Water/Sewer  
☐ Administrative Matter  
☐ Other: \_\_\_\_\_

- ☐ Affidavit  
☐ Agreement  
☐ Answer  
☐ Appellate Review  
☐ Application  
☐ Brief  
☐ Certificate  
☐ Comments  
☐ Complaint  
☐ Consent Order  
☐ Discovery  
☐ Exhibit  
☐ Expedited Consideration  
☐ Interconnection Agreement  
☐ Interconnection Amendment  
☐ Late-Filed Exhibit  
☐ Letter  
☐ Memorandum  
☒ Motion  
☐ Objection  
☐ Petition  
☐ Petition for Reconsideration  
☐ Petition for Rulemaking  
☐ Petition for Rule to Show Cause  
☐ Petition to Intervene  
☐ Petition to Intervene Out of Time  
☐ Prefiled Testimony  
☐ Promotion  
☐ Proposed Order  
☐ Protest  
☐ Publisher's Affidavit  
☐ Report  
☐ Request  
☐ Request for Certification  
☐ Request for Investigation  
☐ Resale Agreement  
☐ Resale Amendment  
☐ Reservation Letter  
☐ Response  
☐ Response to Discovery  
☐ Return to Petition  
☐ Stipulation  
☐ Subpoena  
☐ Tariff  
☐ Other: \_\_\_\_\_

Print Form

Reset Form



# ROBERT GUILD

Attorney at Law

314 Pall Mall • Columbia, South Carolina 29201 • 803-252-1419 • bguild@mindspring.com

December 22, 2017

Ms. Jocelyn D. Boyd  
Chief Clerk  
Public Service Commission of South Carolina  
Post Office Drawer 11649  
Columbia, SC 29211

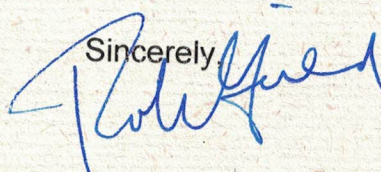
In Re: Friends of the Earth and Sierra Club v. SCE&G,  
Docket No. 2017-207--E

Dear Ms. Boyd:

Enclosed please find for filing and consideration Complainants' Motion to  
Compel Discovery, together with Certificate of Service.

With kind regards I am

Sincerely



Robert Guild

Encl.s

CC: K. Chad Burgess, Esquire





BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2017-207-E

In Re: Friends of the Earth and Sierra Club,	)
Complainants/ Petitioners,	)
	)
v.	)
	)
South Carolina Electric & Gas Co.,	)
Defendant / Respondent.	)

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COMPLAINANTS' MOTION TO COMPEL DISCOVERY

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Pursuant to R. 103-833 and R. 103-835 of the Commission's Rules, Rules 26 and 37 of the South Carolina Rules of Civil Procedure and the Commission's Orders No. 2017-637, dated October 4, 2017, No. 2017-691, dated November 1, 2017, and No. 2017-770, dated December 20, 2017, the Complainants, Friends of the Earth and Sierra Club, hereby move the Commission for an order compelling South Carolina Electric & Gas Co..(SCE&G), to fully respond, without further delay, to all outstanding discovery requests sought by Complainants by providing all responsive documents and other records as specifically requested, organized in a reasonably accessible format and properly indexed to the specific subject document request. Complainants urge the Commission to reject the spurious and dilatory objections asserted by SCE&G to virtually every discovery request made, claiming vagueness, overbreadth, irrelevance or privilege.

In the alternative, should the Commission entertain SCE&G's unsubstantiated, shotgun claims of privilege, we request that SCE&G be ordered to provide a detailed identification and description of the documents claimed to be privileged in the form of a 'privilege log,' adequate to allow us to assess the applicability of the privilege; and, then, to examine such documents, in camera, to review and determine whether such documents, if privileged, should be produced as essential to the determination of the issues in this proceeding and, otherwise, unavailable to Complainants. Finally, Friends of the Earth and Sierra Club request that the Commission order SCE&G to permit them and their agents, at times and in a manner to be agreed upon, to enter the subject facility for purposes of inspection, measuring, surveying, photographing, testing, or sampling as authorized by discovery rules, but refused by the Company.

This matter has been pending since June 22, 2017. Complainants' initial discovery, Complainants' First Interrogatories, Document Production Requests, and Request for Entry, was served on SCE&G and filed with the Commission on July 7, 2017. Docket ID No. 271185. Complainants' Second Interrogatories, Document Production Requests, and Request for Entry, was served on SCE&G and filed with the Commission on October 10, 2017. Docket ID No. 272499. No response, document production, or objections whatever to this discovery was made by SCE&G until December 1, 2017, some five (5) months after initial requests, when counsel for SCE&G contacted Complainants' counsel and served the response and objections attached hereto. Exhibit 1. Defendant/Respondent's Responses and Objections to Complainants' first and Second Set of Interrogatories, Document Production Requests, and Request for Entry. In conversation that date, SCE&G's counsel stated that it was making available a first

production of documents by posting password protected files on a password protected website. SCE&G counsel stated that it was refusing to produce even the widely published "Bechtel Report," as well as its drafts and referenced documents, asserting various privileges. Counsel further asserted that certain Westinghouse-related documents marked "confidential" were being provided despite Complainants' refusal to agree to any order of confidentiality and insistence on full liberty to circulate and publish such documents at will. The limited documents produced, 896 pages, were provided in very poorly accessible jpeg and txt formats, rather than the routine pdf document format, requiring laborious efforts to reassemble and review. They were largely unresponsive to the specific requests made; were unindexed and unidentified to a particular document request; were largely duplicative, consisting of repeated e-mails and random invoices. SCE&G should be compelled to provide all further documents in a fully indexed, accessible pdf format, identified to a specific document production request. While we maintained to SCE&G that our document requests were "are sufficiently clear as stated;" our invitation to SCE&G's counsel to "please let me know what clarifying information you need to provide responsive documents," has been, to date, unanswered.

Documents sought, but objected to, included those regarding "the revised fully resource-loaded integrated project schedule," Requests 1 and 2, first discovery; Westinghouse and Toshiba solvency, Request 3, first discovery; the "Fixed Price Contract," Request 4, first discovery; the prudence of project abandonment, Request 5 and 6, first discovery; "any false statement, misrepresentation or fraud regarding the so-called "Fixed Price Contract," Request 7, first discovery; the "Interim Assessment Agreements between SCE&G and Westinghouse," Request 8, first discovery; "eligibility



for production tax credits,” Request 9, first discovery; the “Project Assessment Report, by Bechtel,” Request 1, second discovery; “Documents Reviewed by the Owners and Consortium, described by Bechtel,” Request 2, second discovery; documents relating to the October 22, 2016, Bechtel presentation, Request 3, second discovery; responses by SCE&G to the Bechtel reports, Request 4, second discovery; documents relating to the Construction Oversight Review Board, Request 5, second discovery; submission to the Employee Concerns Program related to fraud, waste, construction quality, etc., Request 6, second discovery; documents related to the August 23, 2013, letter regarding “Confidential Contract negotiations,” from Carter to Marsh, Request 7, second discovery; documents related to the November 28, 2016, Carter to Marsh e-mail entitled “Nuclear Timelines,” Request 8, second discovery; documents related to the May 6, 2016, letter on project Substantial Completion Dates,” Request 9, second discovery; documents relating to those identified by Marsh and Byrne in testimony to the SC Senate hearing on September 18, 2017, second discovery; documents regarding the project subpoenaed from SCANA by the US Attorney, Request 11, second discovery; documents related to the May 7, 2012, Westinghouse position paper on the applicability of SC engineering and building code laws to the project, Request 12, second discovery; documents provided in discovery to ORS in Docket No. 2017-305-E, Request 13, second discovery; and documents reflecting consideration or decision to withhold information regarding the project from regulators and the public or to misrepresent or mislead them regarding the cost or schedule or prudence of the project, Request 14, second discovery.

In response to each and every request, SCE&G asserted general and specific, but boilerplate, objections. As to all but a few requests, they appear to have produced no

documents whatever. As to only a few requests, SCE&G asserts that they are or will produce some non-privileged documents. However, given the form and organization of those documents produced to date, it is impossible to determine if, or to what extent, SCE&G has provided any responsive documents to any specific request.

With regard to the Bechtel Report and its progeny- drafts, working papers, references, responses and related documents- any privileges or confidentiality of such documents has been lost by the wide publication of the report and drafts; waived by SCE&G's disclosure of the report and related documents to others and waived by SCE&G's extensive discussion and disclosure of the report and related documents in public presentations to the Commission in its Reply Brief and Exhibits in Support of its Motion to Dismiss, dated December 7, 2017, in Docket No. 2017-305-E; and in its oral argument in support of its Motion to Dismiss, on December 13, 2017, in this proceeding. The Bechtel Report and all documents related thereto should be produced in discovery.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Rule 26(b), SC Rules of Civil Procedure.

The attorney work product doctrine shields documents from production in discovery under limited circumstances.

The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. See Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in



determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992) (document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir.2004) (document "should be deemed 'in anticipation of litigation' ... if ... [it] can be fairly said to have been prepared or obtained because of the prospect of litigation." (citation omitted)); *In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 593 (5th Cir.2000) (primary motivation behind creating the document must be to aid in possible future litigation).

Tobacoville USA v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (SC 2010).

Upon objection to the assertion of a privilege to withhold documents based on attorney - client privilege or the work product doctrine, the proper course is to require the production of a 'privilege log' detailing the documents involved and the submission of such claimed protected documents for in camera review by the Commission or Hearing Officer for determination. Stokes-Craven Ford v. Scott L. Robinson and Johnson McKenzie & Robinson, LLC, .. Slip Op. At p. 15 (SC September 9, 2015).

WHEREFORE, the Complainants, Friends of the Earth and Sierra Club, hereby move the Commission for an order compelling South Carolina Electric & Gas Co. to fully respond, without further delay, to all outstanding discovery requests sought by Complainants by providing all responsive documents and other records as specifically requested, organized in a reasonably accessible format and properly indexed to the specific subject document request. We further request that the Commission order SCE&G to permit them and their agents, at times and in a manner to be agreed upon, to



enter the subject facility for purposes of inspection, measuring, surveying, photographing, testing, or sampling .as authorized by discovery rules, but refused by the Company.

Respectfully submitted,

December 22, 2017



Robert Guild  
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Columbia, SC 29201  
(803) 917-5738

ATTORNEY FOR COMPLAINANTS / PETITIONERS  
FRIENDS OF THE EARTH AND SIERRA CLUB

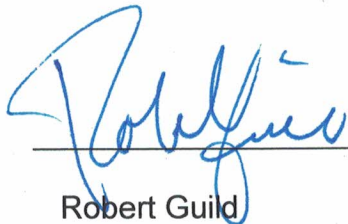
## CERTIFICATE OF SERVICE

I hereby certify that on this date I served the above Motion to Compel Discovery by electronic filing and by placing copy of same in the United States Mail, first-class postage prepaid, addressed to:

K. Chad Burgess, Esquire  
South Carolina Electric & Gas Company/SCANA  
220 Operation Way - MC C222  
Cayce, SC 29033-3701  
(Without Exhibit)

Other Parties by Electronic Filing

December 22, 2017

  
Robert Guild